

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LANA HAWS,

Plaintiff-Appellant,

v

CITY OF BIRMINGHAM,

Defendant-Appellee.

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UNPUBLISHED

January 24, 2003

No. 234857

Oakland Circuit Court

LC No. 99-015441-NI

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying her motion for reconsideration of an order granting defendant's motion for summary disposition and dismissing defendant from the case.<sup>1</sup> We affirm.

**I. Facts and Procedure**

On June 16, 1997, plaintiff was driving southbound on Woodward Avenue near the intersection of Redding Street in or near the City of Birmingham when she was rear-ended by a car driven by Kobe Marshall Solomon. Near the site of the accident, on the median of Redding Street, was a temporary memorial constructed for Detroit Red Wings members injured in an automobile accident that had occurred three days earlier.

After the accident involving the members of the Red Wings, people began to gather at the site of the Red Wing accident. People left things such as flowers, teddy bears, and cards at the accident site. The area was cordoned off by the Birmingham Police Department because of safety concerns. After the median was cordoned off, a crowd gathered on the westside of Woodward Avenue in a vacant triangular grass spot off of Redding Street referred to as the "Redding split." The number of people gathering in the area of the Red Wing accident site

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<sup>1</sup> The complaint filed by plaintiff also names the Oakland County Road Commission and Kobe Marshall Solomon as defendants. The claims against the Oakland County Road Commission and Solomon were dismissed, and are not pending before this Court. Therefore, throughout this opinion, the Oakland County Road Commission and Solomon will be referred to by name, and the City of Birmingham will be referred to as defendant.

continued to grow through June 16, 1997. Richard Patterson, defendant's Chief of Police, stated in his deposition that he knew the situation at the memorial was eventually going to get out of hand. Plaintiff was headed to the memorial to pray for the Red Wings players when the accident giving rise to this lawsuit occurred.

Plaintiff filed the instant lawsuit alleging that, as a result of the negligence of the Oakland County Road Commission, defendant, and Kobe Marshall Solomon, the ultra vires acts of defendant, and the causing of a nuisance per se by defendant and the Oakland County Road Commission, she has suffered and continues to suffer pain, shock, permanent physical and emotional injuries, and incidental and consequential damages. Specifically, plaintiff alleged that defendant had actual knowledge of the Red Wing memorial that was erected, and exercised control over this memorial by moving it to an island that was immediately adjacent to southbound Woodward Avenue and Redding Street. Plaintiff asserted that by exercising control over the memorial, defendant engaged in an ultra vires act neither expressly nor impliedly mandated or authorized by the constitution, statute, or other law. Plaintiff further asserted that defendant had a duty to make the roadway safe and breached this duty by not removing the memorial or by not providing traffic control devices or warning signs. Additionally, plaintiff contended that defendant breached a duty to keep the highway under its jurisdiction reasonably safe and fit for travel. Furthermore, plaintiff alleged that defendant owed a duty to the general public to remove a nuisance per se from its jurisdiction. Plaintiff contended that defendant breached this duty by allowing the memorial to remain in the area creating an unsafe condition, and that as a direct and proximate result, plaintiff suffered injuries.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10), arguing, among other things, that plaintiff pled no facts to avoid governmental immunity. The trial court granted defendant's motion for summary disposition. The trial court concluded there was no exception to governmental immunity applicable to plaintiff's case. Plaintiff filed a motion for reconsideration of the trial court's order or, in the alternative, to file a first amended complaint. Specifically, plaintiff contended that the court gave no consideration to the case law she presented, and did not consider the amended and supplemental pleadings. Plaintiff further asserted that, had trial court considered the authorities she presented, it would have been compelled to find that the complaint stated a justifiable action. Lastly, plaintiff contended that, if summary disposition was granted under MCR 2.116(C)(8), (C)(9), or (C)(10), the court must grant plaintiff an opportunity to amend her complaint. The trial court denied the motion for reconsideration, concluding there was no palpable error. The trial court also denied plaintiff's request to amend her complaint, because summary disposition had been granted pursuant to MCR 2.116(C)(7). The court further concluded that any amendment would be futile because plaintiff could not avoid governmental immunity. This appeal followed.

## II. Analysis

Plaintiff argues that the trial court clearly erred in finding governmental immunity as a matter of law. We disagree. The trial court granted summary disposition pursuant to MCR 2.116(C)(7). The applicability of governmental immunity is a question law, which we review de novo. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). This Court also reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7),

this Court considers all affidavits, pleadings, and other documentary evidence submitted by the parties and construes the pleadings in favor of the nonmoving party to determine whether defendant is entitled to immunity. *Pusakulich v City of Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). Moreover, statutory interpretation presents a question of law that is reviewed de novo. *Omelenchuk v City of Warren*, 461 Mich 567, 571 n 10; 609 NW2d 177 (2000).

Generally, all governmental agencies are immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407; *Weakley v Dearborn Heights (On Remand)*, 246 Mich App 322, 325; 623 NW2d 177 (2001). The term “governmental agency” is defined to include municipal corporations such as defendant city. *Weakley, supra*, 246 Mich App 325. The immunity conferred upon governmental agencies is broad. *Robinson v Detroit*, 462 Mich 439, 455; 613 NW2d 307 (2000). However, there are several narrowly drawn exceptions to governmental immunity, including the highway exception, MCL 691.1402(1), which provides, in part:

[E]ach governmental agency *having jurisdiction over a highway* shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel. (Emphasis added.)

A governmental agency cannot be liable for negligence with respect to a highway, in an action arising from personal injuries incurred in an accident on the highway, where the governmental agency lacks jurisdiction over the highway. *Berry v Belleville*, 178 Mich App 541, 547; 444 NW2d 222 (1989). The accident at issue in this case took place on Woodward Avenue. There is no dispute that Woodward Avenue is not under defendant’s jurisdiction.<sup>2</sup> “Only one governmental agency at a time can have jurisdiction over a highway; there is no concurrent jurisdiction.” *Sebring v City of Berkley*, 247 Mich App 666, 684; 637 NW2d 552 (2001). Because jurisdiction over Woodward Avenue rested with the Michigan Department of Transportation, defendant cannot be held liable under the highway exception to governmental immunity. The trial court did not err in finding governmental immunity as a matter of law.<sup>3</sup>

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<sup>2</sup> Plaintiff does not dispute that the Michigan Department of Transportation has jurisdiction over the section of Woodward Avenue where the accident occurred. Defendant’s Chief of Police attested that “Woodward Avenue. . . is a state trunk line under the jurisdiction and control of the Michigan State Department of Transportation.”

<sup>3</sup> Plaintiff also argues the governmental immunity act’s highway exception should be construed to make defendant liable for injuries that occurred on a highway that was not under its jurisdiction because an alleged “point of hazard” was within defendant’s jurisdiction. However,  
(continued...)

Plaintiff also claims the trial court abused its discretion by not allowing plaintiff to amend her complaint. The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). The trial court must specify its reasons for denying a motion to amend a complaint. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973); *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990). The trial court may not let its view of the merits of the case affect its decision. *Commodities Export Co v Detroit*, 116 Mich App 57, 71; 321 NW2d 842 (1982). This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion that resulted in injustice. *Weymers, supra*, 454 Mich 654; *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling. *Detroit/Wayne Co Stadium Authority v 7631 Lewiston, Inc.*, 237 Mich App 43, 47; 601 NW2d 879 (1999).

MCR 2.118(A)(2) provides that "a plaintiff may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Reasons which justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464, 486-487; 652NW2d 503 (2002). The trial court found that allowing plaintiff to amend her complaint would have been futile, because no amendment would avoid governmental immunity. An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc.*, 230 Mich App 352, 355; 584 NW2d 345 (1998). There is no dispute that plaintiff's injuries occurred on Woodward Avenue. There is also no dispute that Woodward Avenue is not under defendant's jurisdiction. Thus, plaintiff's claim against defendant is not saved by the highway exception to governmental immunity. Plaintiff's claim against defendant is legally insufficient on its face because the suit is barred by governmental immunity. Plaintiff could not amend her complaint in a way that would bring her claim against defendant within the highway exception to governmental immunity. Therefore, granting leave to amend would have been futile. Accordingly, the trial court did not abuse its discretion in denying plaintiff leave to amend her complaint.

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the Michigan Supreme Court has stated that it is a basic principle that "the immunity conferred upon governmental agencies is *broad*, and exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2002). Consistent with this basic principle no action may be maintained under the highway exception unless it is clearly within the scope and meaning of MCL 691.1402(1). *Weaver v Detroit*, 252 Mich App 239, 245; 651 NW2d 482 (2002). Plaintiff's interpretation is inconsistent with the plain reading of the statute. This Court, in *Sebring, supra*, 247 Mich App 684, limited the application of the highway exception to the governmental agency having jurisdiction over the highway at the time of the accident, and only one governmental agency at a time can have jurisdiction. The Michigan Department of Transportation would be the one governmental agency with control over the highway in this instance. Therefore, the highway exception, MCL 691.1402(1), does not apply.

Affirmed.

/s/ Brian K. Zahra

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood